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NOTES

THE LAW SCHOOL.—The REVIEW takes great pleasure in announcing the appointments to the Faculty of Law, of Herman Oliphant, LL. B., University of Chicago, to be Professor of Law; and of Richard R. Powell, LL. B., Columbia 1914, to be Assistant Professor of Law. Professor Oliphant gave the course on Bills and Notes in the Summer Session, Columbia Law School, 1920 and heretofore has been Professor of Law at the Law School of the University of Chicago. Professor Powell has been in active practice in Rochester, New York, and has given the second half of the course in Torts in the Columbia Law School, 1921.

Quantum Meruit FOR BENEFITS CONFERRED WITHOUT REQUEST UNDER A VALID CONTRACT WITH A THIRD PERSON.—Two interesting problems are presented by the recent case of *Winton v. Amos* (1921) 41 Sup. Ct. 342. (1) When can there be recovery for benefits conferred without request? (2) To what extent does an express contract fully performed on the part of the plaintiff prevent recovery in *quantum meruit*? The facts material to the discussion are as follows. The Dawes Commission, created by Congress to procure the extinguishment of the tribal lands in Indian Territory, refused to recognize the claims of the Mississippi Choctaws to share in the allotment of the lands of the Choctaw nation. The testator procured contracts with about 1000 Mississippi Choctaws by the terms of which he agreed to use his best efforts to secure their rights in the lands and funds of the tribe, for a fee of one-half the net interest of each allottee in the amount recovered. Much time was spent in working on these claims. The rights of the Mississippi Choctaws were finally recognized, but some of the necessary legislation had declared void all contracts looking to the incumbrance of the land. Subsequently, but prior to the determination of the rights of the Indians, the testator procured a set of new contracts. It should be noted that in order to establish the rights of his clients, it was necessary for the testator to establish the rights of all the Mississippi Choctaws. Later, an act of Congress was passed giving the Court of Claims jurisdiction to hear the claims of the estate of Winton against the Mississippi Choctaws, and to render judgment on the principle of *quantum meruit* in such amounts as might appear equitably due. An amendatory act provided that the land allotted to the Mississippi Choctaws was subject to a lien to the extent of the claims of Winton, subject to the final judgment of the court. The plaintiffs brought an action against all the Mississippi Choctaws. The Supreme Court, in sending the case back for additional findings as to whether or not Winton's efforts actually procured the legislation, *held*, that the plaintiffs could recover against all the Mississippi Choctaws in *quantum meruit*.

No general rule can be formulated by which to determine when recovery may be had for benefits conferred without request. Therefore, in order to understand the principal case better, let us examine some similar situations and try to discover the reasons for the results reached. Usually, where in the furtherance of his own affairs one confers a benefit upon another, he cannot recover even though he expected compensation.¹ The reason seems to be that the defendant's gain is

¹ *Walker v. Stetson* (1894) 162 Mass. 86, 38 N. E. 18; *Ulmer v. Farnsworth* (1888) 80 Me. 500, 15 Atl. 65; *Loring v. Bacon* (1808) 4 Mass. 575; see *Peters v. Gallagher* (1877) 37 Mich. 407, 411.

not the plaintiff's loss, since whatever expenditure was made was necessary in protection of the plaintiff's own interests. If the benefit is conferred in reliance upon a contract with another, no compensation can be recovered.² There is a strong probability that the defendant would not have accepted the benefit had he thought compensation was expected. In a legalistic sense, moreover, the plaintiff has suffered no loss because he got just what he wanted,—the credit of the person with whom he contracted. Yet, if that person is insolvent, the plaintiff is actually poorer.³ On the other hand, if the plaintiff confers the benefit neither incidentally in the promotion of his own interests nor in reliance upon a contract with another, but nevertheless in such a manner as to cause the recipient to believe no compensation is expected, a different problem arises.⁴ When the benefit can be returned in specie, it should be done. Very often, however, this is impossible. Professor Woodward has suggested that if the recipient has been saved from expending money or assuming a pecuniary obligation that otherwise would have been necessary, recovery should be allowed.⁵ On the other hand, if the benefit was not a necessity, or was in the form of money and was spent for non-necessities, there should be no recovery. To make the defendant refund would divert money which would probably have been spent in another way. It is submitted that wherever the benefit is one which can be converted into money and which has been so converted, the plaintiff should be able to recover even though the money has been spent, provided of course it has been used for necessities.⁶

The rule of equity that a trust fund must bear the cost of its administration and that a trustee who brings an action to defend the subject matter may charge his expenses to the fund, has been extended to the cases of beneficiaries suing to protect the trust.⁷ To be entitled to expenses, the beneficiary must be successful.⁸ The remedy is allowed even without showing that the plaintiff expected compensation.⁹ These cases seem clear exceptions to the general rule that no recovery is allowed for incidental benefits. The result is commendable. The contrary rule would put those who bore the risk of litigation in a worse position than the others. The danger of over-zealous beneficiaries thrusting their services upon the class is eliminated by the necessity that those suing must be successful. A right without an efficient method of enforcement is a nullity. Were the recovery in these cases not charged to the fund, it would be practically impossible for a beneficiary to en-

² *Morrison v. Jones* (1880) 6 Ill. App. 89; see *Dodge v. Lansing etc. Co.* (1908) 152 Mich. 100, 110, 115 N. W. 1004.

³ B orders C to deliver an automobile to A. C does this. B becomes insolvent. Or B hires C to paint A's house. C paints the house. B becomes insolvent. A sells the house and it is proved that he received \$1000 more than if the house had not been painted. *Quaere*, should not A be compelled to make restitution?

⁴ This problem was presented in *Concord Coal Co. v. Ferrin* (1901) 71 N. H. 33. 51 Atl. 283, where recovery was denied.

⁵ Woodward, *Quasi-Contracts* (1913) § 57.

⁶ For example: A, who is indebted to B, tells B that he has credit with C and in discharge of the debt to B, he will get C to paint B's house. A gets C to paint B's house. C in fact had not extended any credit to A and expected payment from B when he painted the house. Later, B sells the house. It is proved that the house sold for \$1000 more than if it had not been painted. It is submitted that C should recover against B.

⁷ *Meighan v. American Grass Twine Co.* (C. C. A. 1907) 154 Fed. 346; *Seibert v. Minneapolis etc. Ry.* (1894) 58 Minn. 58, 57 N. W. 1068; *Trustees v. Greenough* (1881) 105 U. S. 527; see *Woodruff v. New York etc. Ry.* (1891) 129 N. Y. 27, 36, 29 N. E. 251; cf. *Davis v. Bay State League* (1893) 158 Mass. 434, 33 N. E. 591; *Weed's Estate* (1894) 163 Pa. St. 595, 30 Atl. 272; *Meeker v. Winthrop Iron Co.* (C. C. A. 1883) 17 Fed. 48.

⁸ See *Hobbs v. McLean* (1886) 117 U. S. 567, 581, 582, 6 Sup. Ct. 870.

⁹ *Seibert v. Minneapolis etc. Ry.*, *supra*, footnote 7; *Trustees v. Greenough*, *supra*, footnote 7.

force his claim for contribution. If he were compelled to levy execution against each co-beneficiary, recovery against some would be impossible, and in case the beneficiaries were numerous, the cost of the proceedings would exceed the gain. Charging the fund works no injustice, since all who share in the benefits must bear a proportional burden.

It is often stated as a general rule that no recovery in *quantum meruit* will be allowed where there is a valid express contract. This rule is subject to limitations. Of course, if the plaintiff has fully performed his contract, he may recover in *indebitatus assumpsit*, treating the contract as creating a debt.¹⁰ The courts, however, often make the statement that recovery can be had in *quantum meruit*, but the measure of damages is the contract price.¹¹ Such statements lead to a confusion of thought.¹² There are two theories upon which recovery is allowed in general assumpsit where there is a valid express contract: (1) compensation, *i. e.*, enforcement of a debt created by the contract; (2) restitution. Where the plaintiff has completed performance and is not in default, recovery is allowed on the first theory. If, however, the defendant is in default to such an extent as to amount to a repudiation of the contract, the plaintiff may recover on the basis of restitution; *i. e.*, the defendant must give back what he received from the plaintiff.¹³ Apparently if the plaintiff has completed performance, recovery in *quantum meruit* on the theory of restitution is not allowed.¹⁴ As Professor Woodward¹⁵ and Professor Keener¹⁶ point out, there is no logical reason for this exception. It seems no injustice to compel the defendant to return the value of that which the plaintiff gave in reliance upon his contract even though such value is greater than the contract price, especially where the benefit conferred was services which cannot be returned in specie. To limit recovery to the contract is to give the defendant the benefit of a contract which he has repudiated.¹⁷

Winton v. Amos comes within the class of cases where recovery is allowed even though the benefit was conferred without request and even though the plaintiff's main object was the protection of his own interests. The purpose of those Indians who contracted with the testator was to establish their own rights,

¹⁰ *Delgarno v. Halloway* (1919) 56 Mont. 561, 186 Pac. 332; *Virginia etc. Co. v. Hurkamp* (1919) 124 Va. 721, 98 S. E. 681; *Morin v. Robarge* (1903) 132 Mich. 337, 93 N. W. 886.

¹¹ "In all such cases where the plaintiff sues in *indebitatus assumpsit* as for *quantum meruit*, on the theory that he has fully performed the contract and nothing remains but for the defendant to pay, his recovery is to be for the reasonable value, but not exceeding the contract price." *Surety Co. v. Construction Co.* (1914) 182 Mo. App. 667, 674, 166 S. W. 333.

¹² This confusion is illustrated by the fact that where a note has been given in payment, recovery has been denied even though there had been a material breach of the contract. See *Carson v. Allen* (Ky. 1838) 6 Dana 396, 397; *cf. Manton v. Gammon* (1880) 7 Ill. App. 201; but *cf. Stockdale v. Schuyler* (1890) 55 Hun 610, 8 N. Y. Supp. 813, *aff'd* (1891) 130 N. Y. 674, 29 N. E. 1034. There has been a similar confusion in other cases. Recovery has been denied in *quantum valebat* in a case where the sale of goods on credit was induced by fraud, on the ground that as the time of credit had not yet expired, the plaintiff could not sue on the contract. *Kellogg v. Turpie* (1879) 93 Ill. 265. The sound result was reached in *Crowncycle Co. v. Brown* (1901) 39 Ore. 285, 64 Pac. 451.

¹³ *Franklin Motor Car Co. v. Kast* (1913) 171 Mo. App. 309, 157 S. W. 841.

¹⁴ *Reams v. Wilson* (1908) 147 N. C. 304, 60 S. E. 1124; *Campbell v. District of Columbia* (1876) 12 D. C. 533; *Anderson v. Rice* (1852) 20 Ala. 239; see *Shropshire v. Adams* (Tex. Civ. App. 1905) 89 S. W. 448, 449; *contra, Scarborough v. Wheeler* (Tex. App. 1915) 172 S. W. 196, (*semble*).

¹⁵ Woodward, *op. cit.* § 262.

¹⁶ Keener, *Quasi-Contracts* (1893) 301, 302.

¹⁷ There is the objection that as the services were rendered at a stipulated price, the plaintiff should not be able to recover more than he stipulated. Also if you allow a greater recovery, you are in effect penalizing the defendant.

and it is doubtful whether they ever expected compensation. The land held by the government was in substance a trust estate. Because the government was trustee, legislation instead of litigation was necessary to protect the trust estate. Hence the expenses of procuring it were appropriate and under the rule stated above should be charged on the fund.¹⁸ The efficacy of this method of enforcing the plaintiff's claim is especially evident in this case. The power of one beneficiary to subject all who share in the benefit to a duty to share in the expenses, has been recognized as transferable to the attorney whom he employs.¹⁹ In the principal case, since all parties are in court, as a practical matter, it is not unreasonable for the court to transfer the power to avoid circuitry of action.

Recovery is allowed in *quantum meruit*. In so doing, the court says that it makes no difference whether the contracts were valid or not. This is, to say the least, a rather inaccurate statement. Valid contracts make a great difference under certain circumstances. If the court means only that recovery in *quantum meruit* is limited by the contract price, then it is correctly granting the same relief which would be allowed in *indebitatus assumpsit*.²⁰ However, the language conveys no such meaning. Assuming the contracts to be valid, let us examine the result in two different states of fact: (1) the contracting Indians under such a default as to amount to a repudiation of the contract; (2) the contracting Indians under no such default. In the first case, recovery against those Indians who contracted could logically be sustained on the theory of restitution. But it does not seem equitable that contribution for an amount greater than the contract price should be allowed, because the whole class would thus be penalized for the default of a few. In this event, since the sum which the beneficiaries could charge on the funds would not be identical with the sum for which they would be liable to the plaintiffs, the argument that recovery should be allowed to the plaintiffs to avoid circuitry of action does not apply.²¹ In the second case, the plaintiffs are waiving a valid express contract in an attempt to get more than they stipulated. Here, there is no ground for allowing recovery. But if we assume that the contracts were invalid, then recovery is correctly allowed in *quantum meruit*, and the only importance of the contracts, as the court said, was to show that the services were not rendered gratuitously.

In conclusion, the result reached in *Winton v. Amos* is extremely commendable provided that the recovery which is to be allowed is not in excess of the contract price. However, if the order of the court is to be interpreted so as to allow a greater recovery, the case cannot be justified. It can be accounted for, however, by the desire of the court to give effect to the jurisdictional acts which allowed the plaintiffs to sue.

RIGHTS OF INNOCENT PURCHASER OF ORDER CHECK ENDORSED BY PERSON BEARING SAME NAME AS PAYEE.—When an unendorsed check or draft payable to the order of an existing person comes into the possession of a third person bearing a name similar to or identical with that of the intended payee, and the third person endorses the check to an innocent purchaser for value, the question arises as to what rights he has upon the "instrument." This question was involved in the recent case of *Slattery & Company v. National City Bank* (Mun. Ct., City of N. Y. 1920) 186 N. Y. Supp. 679. The plaintiff stockbrokers had had business dealings

¹⁸ *Supra*, footnote 7.

¹⁹ *Central etc. Co. of Ga. v. Pettus* (1885) 113 U. S. 116, 5 Sup. Ct. 387; *cf. Schoenherr v. Van Meter* (1915) 215 N. Y. 548, 109 N. E. 625.

²⁰ *Supra*, footnote 10.

²¹ The plaintiffs could of course recover more from those Indians with whom they contracted than the latter in turn could recover from the other Indians.